Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

JOSEPH SHIELDS, *Petitioner*

v.

DUDLEY C. SHARP, Secretary of the Air Force

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Joseph Shields prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered November 1, 1960. An order granting an extension of time to March 1, 1961, within which to file a petition for a writ of certiorari was granted on January 24, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Does a Government agency have unlimited and unreviewable discretion to delay nine years before dismissing an employee on a charge against him which was in the Government's possession during the entire nine year period particularly where such delay was never authorized by Congress or the President or by any of the applicable regulations?

2. Did the Air Force act in an arbitrary and unfair manner and thus deny to petitioner procedural due process by invoking partial use of its Security Regulations to protect its own confidential reports but denying to the petitioner the safeguards contained therein by dismissing him under its Grievance Procedure Regulations which contain no such safeguards particularly where such a procedure is not authorized by statute, regulation or Presidential order?

3. Were the requirements of procedural due process violated where petitioner was denied the opportunity of cross-examination and confrontation and denied the opportunity to inspect the documents containing the information on which the Air Force based its decision to dismiss him even though the Grievance Procedure Regulations, under which the "Hearing" was held, contain no restrictive provisions justifying such denial?

4. Did the procedure employed by the Air Force violate Executive Order 10450 which requires that all persons employed by the Government be adjudged by "Mutually" consistent standards and procedures and result in a denial of procedural due process?

5. Did the Air Force substantially depart from applicable procedures and violate the provisions of

(a) its Grievance Procedure Regulations where the ad Hoc Grievance Committee refused to require the attendance of the Air Force officer solely responsible for the

decision to discharge petitioner and, where, before the "Hearing" and without notice to the petitioner or his counsel, the Committee members visited the Metropolitan Police Department to verify facts contained in an Air Force report?

(b) the Civil Service Commission's regulations requiring that dismissal be based only on the charge presented to the employee when, after such charge was presented, the Air Force officer who made the decision to dismiss petitioner, in making that decision, considered an unsworn statement made after the written charge was filed against petitioner but prior to the issuance of the notice of removal?

STATEMENT

The Complaint alleged violations of the Air Force Grievance Procedure Regulations, the Civil Service Procedural Requirements and the Constitution because of failure of confrontation and cross-examination. The District Court dismissed the Complaint on the ground that Plaintiff had been afforded all of the procedural rights granted under the Air Force Grievance Procedure Regulations. An appeal to the Court of Appeals followed, and the judgment of the trial Court was affirmed.

Petitioner, an employee of the United States Government since 1942, was employed by the Department of the Air Force from December 1948 to June, 1954. At the time of his dismissal he was Chief of the Personnel Statistics Branch. During the course of his employment he received letters of commendation from his superiors for his excellent work. (J.A. 81-85)

On May 12, 1954, petitioner was served with a "Notice of Proposed Removal," signed by C. R. Landon, Major General, U.S.A.F., notifying petitioner that action was being initiated to remove him from his position as Reports Control Officer GS-12 because of information furnished to Landon through investigation channels. Said Notice

charged "Immoral Conduct Off Duty" based on an excerpt from a statement made nine years before, on July 23, 1945, by Lieutenant Commander Herman Andrew Dudley, USNR. The excerpt, after stating:

> "The following are all the acts of homosexuality in which I have engaged which I can remember sufficiently to enumerate . . ."

charged the petitioner with committing an abnormal sex act. The Notice also alleged that petitioner was acquainted with four individuals who were known to be homosexuals by the Metropolitan Police Department, D. C.; that petitioner had resided for a few weeks at a "P" Street address, Washington, D. C., which had been identified as a former hangout for a homosexual clique by the Metropolitan Police, D. C.; that petitioner had been identified as having attended parties given by two named individuals at the P Street address which were attended by persons identified as homosexuals.

Under date of May 19, 1954, petitioner answered the charges under oath. He categorically denied the charge of abnormal sex acts with Dudley, admitted knowing the four persons allegedly "known by the Metropolitan Police, D. C., as known homosexuals" but denied knowing that they were homosexuals, admitted having lived at the "P" Street address for a period of two weeks, but denied knowing that it was a hangout for homosexuals, and categorically denied that he had ever attended any parties at any time or any place given by the individuals named. (J.A. 73-78)

Under date of June 14, 1954 petitioner received a "Notice of Removal" signed by General Landon advising him that final decision had been made removing him from his position as Reports Control Officer. This Notice stated that petitioner's answer to the "Notice of Proposed Removal" did not offer any facts in refutation of the charge made by

Dudley nor did petitioner explain why Dudley made the charge. This Notice advised petitioner that he could appeal this decision under the "Air Force Grievance Procedure as stated in Headquarters Office Instruction 40-47 a copy of which is attached for your information and guidance." (See Notice of Removal, J.A. 78-81). Petitioner was notified that he could have thirty days in which to appeal.

Thereafter, on July 13, 1954, petitioner, through his attorney, requested an oral hearing in the matter and by letter dated July 21, 1954 to petitioner's attorney, a hearing was set and was held on July 28, 1954 before an "ad hoc Grievance Committee" appointed by the Secretary of the Air Staff in accordance with the provisions of sec. 7 c. (1) of the Air Force Grievance Procedure Regulations, HOI 40-47, p. 5.

At the hearing the Chairman stated that due to the nature of the case there would be some variance from the normal procedure inasmuch as Management's information in this case was gotten from investigative reports from other channels and the action that was taken was based on the reports furnished it and the information furnished it from investigative channels and further that the administrative action initiated by Management was not as a matter of something that happened in the office. (J.A. 2-3).

The Air Force Grievance Procedure Regulations provide that if necessary to insure adequate presentation of testimony for the person complained against, the committee may request appropriate administrative authority to require the attendance of Air Force employees as witnesses. On July 22, 1954, petitioner, through his attorney and prior to the hearing, requested that certain witnesses be produced at the hearing, specifically requesting the presence of Major General C. R. Landon, an employee of the Air Force, who signed the "Notice of Removal" and who, alone, was responsible for the decision to remove petitioner from his position. (J.A. 64-65). The reason given for Landon's

absence was that " * * * he is retiring at the end of this month and he is undergoing physical examinations and everything and he cannot get away" (J.A. 15). The Air Force did not require his presence although petitioner's attorney asked for a postponement of the hearing, if necessary, in order that he (Landon) be available as a witness. (J.A. 14-15). The request was denied. (J.A. 15). Sec. 7-e. (2) of HOI 40-47, p. 5, provides that the Committee's " * * * one primary purpose is to assist the Secretary of the Air Staff in arriving at a prompt and fair decision by:

(a) Making a full and complete investigation of the evidence.

(b) Impartially appraising the evidence. * * * "

Petitioner's attorney also requested, prior to the hearing, that a representative of the Metropolitan Police Department be present at the hearing who could testify that certain persons named in the "Notice of Proposed Removal" were identified by the Police Department as homosexuals. No one appeared. (J.A. 12-13).

After the date for the Hearing was set but before the Hearing and without notification to the petitioner or his attorney, at the request of the Committee itself, the members thereof met with Inspector Blick of the Metropolitan Police Force at his office to verify an Air Force report with respect to the persons named in the "Notice of Proposed Removal." (J.A. 34-37).

TS 350, S1-21 (Procedures under Sec. 9.102 (a) (1) of the Commissioner's Regulations—Federal Personnel Manual provides that a " * * * separation, suspension, or demotion, if made, must be upon one or more of charges presented to the employee and which he has had an opportunity to answer, and not upon others. * * * "

With reference to the charges made in the "Notice of Proposed Removal" the charge predicated on the affidavit

of Dudley, made in 1945, was the only charge petitioner had an opportunity to answer as far as any statement of Dudley was concerned. (J.A. 70-73).

On May 14, 1954, two days after the "Notice of Proposed Removal" was given to the petitioner, Dudley was interrogated in Paris and the results of that interrogation transmitted to General Landon on June 1, 1954. (J.A. 40-41).

The statement made in Paris by Dudley was an unsworn statement. (J.A. 62-3). Although petitioner was not informed of it and thus had no opportunity to answer it this statement was considered by Landon in arriving at his decision to remove petitioner from his position. (J.A. 65-66).

Sec. II 8.(c) of the Air Force Regulations 40-12 (dealing with the Security Program for Civilian Personnel) provides, as does the Grievance Procedure Regulations, that one of the grounds for dismissal is "immoral conduct".

Sec. 19 c. of Air Force Regulations 40-12 provides that "* * * the refusal of witnesses to cooperate with the Hearing Board will be taken into consideration in determining the probative value of any information attributed to them in the file. * * *" Sec. 21 b. provides that the Hearing "* * * Board will take into consideration the fact that the employee may have been handicapped in his defense by the nondisclosure to him of classified security information, or by the lack of opportunity to cross-examine persons constituting sources of information, and will weigh derogatory information carefully in the light of its recency * * *"

None of the witnesses requested by petitioner's counsel appeared at the hearing except the investigator, an employee of the Office of Special Investigation, who interrogated the petitioner on March 17, 1954. (J.A. 11-12).

The charge against the petitioner made by Dudley was contained in a statement made nine years before the petitioner was dismissed. (J.A. 10).

Petitioner's counsel was not permitted to see the statement which contained the excerpt concerning the petitioner because it was a part of an official CONFIDENTIAL document. (J.A. 10). Nor was the identity of the person or persons who identified the petitioner as having attended parties at 1627 "P" Street in the fall of 1944 (J.A. 10) made known because the information was from confidential sources and the other Government Agency would not disclose it. (J.A. 31). Likewise, petitioner's counsel was not permitted to see the investigative report on the interrogation of Dudley in Paris in May of 1954 until certain references to another Government Agency were deleted because it involved the matter of technical adherence to security regulations regarding other agencies. (J.A. 40-41).

By letter dated November 30, 1954, petitioner was notified that the decision removing him from his position had been upheld by the Secretary of the Air Staff and advised him that he might request a review by the Headquarters Grievance Review Committee within ten days.

Thereafter, on January 18, 1955, petitioner, through his attorney, requested a review of the decision of the "ad hoc Committee" and filed a brief on appeal.

Under date of June 15, 1955, petitioner was advised by letter signed by the Assistant Vice Chief of Staff, U.S.A.F. that the decision removing him had been sustained and advising him that the decision could be appealed to the Secretary of the Air Force.

Thereafter, on August 29, 1955, petitioner, through his attorney, requested a review of his dismissal by the Secretary of the Air Force, and on May 18, 1956, was notified by letter over the signature of James P. Goode, Deputy for Manpower Personnel and Organization that the decision removing him was final.

On June 26, 1956, the petitioner filed a suit for reinstatement in the United States District Court for the

District of Columbia (Civil Action No. 2676-56). That suit was dismissed on December 17, 1957 on the sole ground that the petitioner (then plaintiff) had failed to substitute James H. Douglas for Donald A. Quarles as party defendant within six months pursuant to the provisions of Rules 6 (b) and 25 (d) of the Federal Rules of Civil Procedure. A new suit was filed on January 8, 1958.

STATUTES AND REGULATIONS INVOLVED

Grievance Procedure Regulations—HOI 40-47.

Sec. 7 (g), p. 7:

"Witnesses. The committe has no authority to compel witnesses to give testimony. However, if necessary to insure adequate presentation of testimony for either the complainant or the person(s) complained against, the committee may request appropriate administrative authority to require the attendance of Air Force employees as witnesses. * * * *"*

Sec. 7 e (2), p. 5:

"*Functions of the Committee.* The committee will serve as a fact-finding and advisory body. It has one primary purpose which is to assist the Secretary of the Air Staff in arriving at a prompt and fair decision by:

(a) Making a full and complete investigation of the evidence.

(b) Impartially appraising the evidence.

(c) Reporting to the Secretary of the Air Staff a record of the hearing proceedings, a statement of the committee's findings, and its recommendations."

Civil Service Commission Regulations:

TS 350, Federal Personnel Manual, S1-21, Procedures Under Regulation 9.102 (a) (1).

"Decision by appointing officer.—The question whether or not the reasons for the separation * * *

is a matter for final determination by the appointing officer. However, the separation, * * * if made, must be upon one or more of the charges presented to the employee and which he has had an opportunity to answer, and not upon others."

Executive Order 10450.

" * * * WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service * * * "

Sec. 8 (a). The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal Service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

" * * * (1.1) Any * * * immoral * * * conduct, * * * "

Security Regulations—AFR 40-12.

Section IV—19.c, p. 14:

" * * * Reasonable cross-examination of witnesses by the Board, by the employee, or by his counsel or representative, will be permitted. The refusal of such witnesses to cooperate with the Board will be taken into consideration in determining the probative value of any information attributed to them in the file. * * * "

Section IV—21, p. 16:

" * * * b. The Board will take into consideration the fact that the employee may have been handicapped in his defense by the nondisclosure to him

of classified security information or by the lack of opportunity to cross-examine persons constituting sources of information, and will weigh derogatory information carefully in the light of its recency, relative seriousness, attendant circumstances . . .

REASONS FOR GRANTING THE WRIT

The Government's claim to unlimited and unreviewable discretion in dismissing a Federal employee by asserting that procedural due process has been satisfied by written notice of the charge and an opportunity to answer the charge in writing is a matter of review by this Court where the facts show that

(a) The Government delayed nine years before informing petitioner of the charge although it had this information in its possession for the entire period;

(b) Dismissed the employee under the provisions of the Air Force Grievance Procedure Regulations which purportedly grant employee the right to a "Hearing" but at such "Hearing" denied the employee the right of confrontation and cross-examination and further denied him any access to the evidence on which it relied because of security regulation although such a commingling of two sets of regulations was never authorized by the legislative or executive bodies;

(c) Deprived the employee of even the limited rights granted him under the Grievance Regulations and the Civil Service Commission Regulations by the Committee's refusal to require the presence as a witness of the Air Force employee who alone was responsible for the decision to dismiss the petitioner; by the Committee's action after the Hearing date was set but before the Hearing and without notice to the employee or his counsel in going to the Metropolitan Police Department to verify facts contained in an Air Force report; by the action of the dismissing officer who, in making his decision to dismiss the

employee, considered an unsworn statement made after the written charge was handed to the employee but prior to his decision of dismissal. The sum total of the foregoing violations and the procedure employed by the Government resulted in an abuse of the discretionary power granted to the Government and a total deprivation of procedural due process to the petitioner.

No one point can better illustrate the total unfairness of the procedure utilized by the Air Force to dismiss Joseph Shields than its unwarranted and unjustifiable delay in informing him of a charge of committing an abnormal sex act, a charge about which the Government had known for nine years. This is particularly true because of the nature of the charge and because of the overwhelming burden of proof imposed on *him* to prove *his* innocence. No presumption of innocence was allowed to enter into the picture. It has been said, and truly so, that immorality is the easiest and most devastating charge to make, and certain to leave its mark whether proved or disproved. To refute a charge of immoral conduct is, at best, extremely difficult. To be required to refute it after a lapse of nine years when the person who made the charge cannot be found is well-nigh impossible. And the record in this case is utterly devoid of any evidence that the Air Force did not have knowledge of the charge until it undertook its investigation prior to Shields' removal, as the Government stated in its brief in the Court below (p. 21) referring to J.A. 38. The record merely stated (J.A. 38) that the Air Force investigator conversed with an agent of another Government agency who "advised me that Commander Dudley had executed a statement". It does *not* state when the conversation took place. That the charge was nine years old is undisputed. Add to this the Air Force's refusal to produce the complete statement which purportedly contained the charge, or indeed any evidence, on the ground of "security", while at the same time totally ignoring the safeguards contained in Sec. 21 (b) of the

Security Regulations which provide that the Board "will weigh derogatory information carefully in the light of its recency * * *" and we have a situation wherein the accused is confronted with impossibility of performance. Certainly this Court could well have had the instant case in mind when it stated in *Greene* v. *McElroy*, 360 U.S. 474 that

> "* * * where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, *the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.* While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. * * *
> "Little need be added to this incisive summary statement except to point out that under the present clearance procedures not only is the testimony of absent witnesses allowed to stand without the probing questions of the person under attack which often uncover inconsistencies, lapses of recollection, and bias, * * * but, in addition, even the members of the clearance boards do not see the informants or know their identities, but normally rely on an investigator's summary report of what the informant said without even examining the investigator personally." (Emphasis supplied)

So it was in the instant case. No witnesses appeared nor was petitioner permitted to know the identity of the persons who identified him as having attended parties at 1627 "P" St. in the fall of 1944 and the facts about this address as this information "* * * was from confidential sources and could not be disclosed * * *". J.A. 31 "* * * it came from other reliable Government agencies * * *". J.A. 43-44. With respect to Dudley's nine year old statement no one connected with this case, including the Committee members, ever saw Dudley's complete statement, either

the original or a copy and it was not made available because it was a part of an official confidential document. J.A. 10. The investigators who interrogated Dudley did not appear. Even the Air Force's own investigative officer saw only a three by five card stating "The following are all the acts of homosexual in which I have engaged which I can remember sufficiently to enumerate * * *" "* * * Shields, Joe, civilian * * *" and the charge against him. This is certainly a far cry from the disclosure deemed essential by this Court as evidenced by its language in the Greene case, *supra*.

Not only did Shields lose his government job but, by virtue of the Government's disclosure to a potential employer that he was removed from his position for "immoral conduct off duty" even before a final decision had been made by the Air Force, (J.A. 90-B) his work opportunities in private employment were severely limited. It is the position of the appellant that neither Congress nor the President ever authorized, either explicitly or otherwise, administrative action whereby an employee is fired under the provisions of the Grievance Procedure Regulations but is denied access to the documentary evidence used to prove the Government's case because of the provisions of the Security Regulations and, at the same time, is denied the safeguard provisions of the Security Regulations by the use of such Grievance Procedure Regulations. Under such circumstances it is submitted that the Supreme Court's decision in the Greene case is controlling in the instant case because, as was stated therein: "* * * petitioner's work opportunities have been severely limited on the basis of a fact determination rendered after a hearing which failed to comport with our traditional ideas of fair procedure. * * * We decide only that in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination. * * *".

It is of course recognized, as the court stated in *Cafeteria and Restaurant Workers Union, Local 473 AFL-CIO, et al.* v. *McElroy*, 284 Fed. 2d 173, that the Lloyd-LaFollette Act of 1912 provides that "No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay." However, here the Air Force did promulgate Grievance Procedure Regulations which do provide for a hearing. It is also recognized that the Security Regulations were promulgated in accordance with Executive Order 10450. (As is pointed out, hereafter, it is believed that the procedure by which appellant was removed violates the provisions of that Executive Order). It is not argued that there were any express restrictions imposed on the authorities as to which set of Regulations they could use in removing Joseph Shields. It is strenuously argued, however, that once having chosen the Grievance Procedure Regulations, it is palpably unfair to deny to the appellant the opportunity to examine, *inter alia*, the full statement from which the excerpt referring to him was taken, on the grounds of security, and at the same time deprive him of the safeguards contained in the Security Regulations. This is particularly true where, as here, the record is devoid of even an iota of evidence that Dudley's statement involved security considerations. Neither the Grievance Procedure Regulations nor the Security Regulations authorize the procedure used and, as has already been stated, neither Congress nor the President has authorized it. Further it is contended that in so proceeding the Air Force denied to petitioner the protective provisions of Executive Order 10450 which provides, *inter alia*, that

> "* * * the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government *be adjudged by mutually consistent and*

no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service * * * "

The well-nigh insuperable burden imposed on petitioner to refute the nine year old immoral conduct charge against him was certainly not lightened by the conduct of the "impartial" ad Hoc Committee. Certainly in the instant case where petitioner's job, livelihood, and reputation are at stake he is entitled at the very least to a "fair" hearing and it is not enough that a hearing be provided only to the extent deemed fair or advisable by those in charge or that some but not all of the elements of such a hearing be made available. *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U.S. 88. If ever a situation called for invoking the authority granted to the Committee under sec. 7 (g) of the Grievance Regulations this certainly was it. That section provides that if necessary to insure adequate presentation of testimony the committee may request appropriate administrative authority " * * * to *require* the attendance of Air Force employees as witnesses". (Emphasis supplied) The decision to remove petitioner from his job admittedly was General Landon's alone (J.A. 64-65) and certainly only he could known the inner workings of his own mind and testify thereto. The Government's position that the Committee's authority is purely discretionary is untenable and can be justified only by placing an unwarranted emphasis on the word "may" and ignoring completely the use and meaning of the word "require". Assuming, arguendo, that the authority of the Committee was discretionary only, considerations of fairness demanded that Landon be required to appear and the Committee's failure to require his attendance was an abuse of such discretion. " * * * Discretionary power does not carry with it the right to arbitrary exercise". *Schactman* v. *Dulles*, 96 App. D.C., 287, 225 F. 2d, 938. That the Committee's refusal to require Landon's attendance re-

sulted in an arbitrary exercise of power is pointed up by the violation of the Civil Service Prpcedural Requirements (Sec. 9.102) (a) (1) which provide that a Government employee must be dismissed on the charge which has been presented to him and which he has had an "opportunity to answer and not upon others". The only charge persented to petitioner with respect to Dudley was that made in 1945. However, on May 14, 1954, two days *after* the Notice of Proposed Removal was given to the petitioner, Dudley was interrogated in Paris and his unsworn statement transmitted to Landon who admittedly took it into consideration in making his decision. (J.A. 65-67.) Petitioner was never informed of this statement and knew nothing about it until it was brought out at the Hearing. Just what effect or how much effect consideration of this statement had on Landon's decision it is impossible to determine since he was not available for questioning and certainly no other witness could testify to the inner workings of his mind. The question is: do the Regulations permit such procedure after the Notice of Proposed Removal has been given to the employee? Do these Rgulations also permit the members of the "impartial" Committee after a date is set for the Hearing, but before the Hearing and without notice to the petitioner or his counsel, voluntarily to go to the Metropolitan Police Department to verify facts in an Air Force report? If they do so permit then far from according petitioner "the additional benefit of its grievance procedure" as the Government argued in its brief in the court below, such regulations in effect impose an additional burden on petitioner in his attempt to prove his innocence of the crime of which he was accused. It is submitted that the procedure followed by the Air Force completely deprived the petitioner of his fundamental right to fairness of procedure. No one can doubt that Joseph Shields was eminently qualified to perform his chosen employment and unqualifiedly suitable therefor. (J.A. 81-85.) After having devoted ten years

to Government employment, why should he not be accorded every safeguard in order to insure that his dismissal therefrom be in accordance with the fundamental principles of justice and fair play? Why should not the Regulations under which he is dismissed be adequate to protect his rights? Why should he not be accorded the protective safe-guards of confrontation and cross-examination as provided by the Fifth Amendment? As was pointed out by the court in *Parker* v. *Lester*, 227 F. 2d 708, "Even the alien lawfully residing in the United States is entitled to this protection. * * * *Kwong Hai Chew* v. *Colding*, 344 U.S. 590 (73 S. Ct. 472)".

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,666 September Term, 1960

JOSEPH SHIELDS, *Appellant*,

v.

DUDLEY C. SHARP, Secretary of the Air Force, *Appellee*.

Before: Edgerton, Washington and Danaher, Circuit Judges, in Chambers.

Order

The above appeal came on for hearing on the record on appeal from the District Court, and was argued by counsel on the briefs and joint appendix.

ON CONSIDERATION WHEREOF, and it appearing to the court that appellant was "accorded his statutory and procedural rights," see *Ellis v. Mualler*, U.S. App. D.C. , 280 F. 2d 722 (1960), and that the District Court committed no reversible error; now, therefore,

It is ORDERED by the court that the judgment of the District Court is affirmed.

Per Curiam

Dated: November 1, 1960

No. 773

In the Supreme Court of the United States

OCTOBER TERM, 1960

JOSEPH SHIELDS, PETITIONER

v.

BRADLEY C. SHARP, SECRETARY OF THE AIR FORCE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 773

JOSEPH SHIELDS, PETITIONER

v.

DUDLEY C. SHARP, SECRETARY OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law entered by the United States District Court for the District of Columbia (R. 97–100)[1] are not reported. The order of the United States Court of Appeals for the District of Columbia Circuit affirming the judgment of the District Court (Pet. App. 1a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1960. On January 24, 1961, the time for filing a petition for a writ of certiorari was ex-

[1] All record references are to the Joint Appendix submitted in the court of appeals and filed here pursuant to Rule 21 of this Court.

tended to March 1, 1961. The petition for a writ of certiorari was filed on February 28, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioner, having been dismissed from civilian government employment under the Lloyd-LaFollette Act after written notice of specific charges and an opportunity to reply, was deprived of statutory or constitutional rights by reason of the informal procedures followed in a grievance proceeding availed of by him under Air Force regulations.

2. Whether the allegedly unwarranted delay in bringing a charge against petitioner prevented his dismissal.

STATUTE AND REGULATIONS INVOLVED

The Lloyd-LaFollette Act of 1912, Sec. 6, 37 Stat. 555, as amended, 62 Stat. 354, 5 U.S.C. 652(a) provides, in pertinent part:

> (a) No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hear-

> ing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. * * *

The relevant regulations are set forth in the Appendix, *infra*, pp. 13–16.

STATEMENT

On May 12, 1954, the petitioner, a non-veteran civilian employee of the Department of the Air Force, received a "Notice of Proposed Removal" signed by C. R. Landon, Major General, U.S.A.F., advising him that action was being initiated to remove him from his position because of "Immoral Conduct Off Duty" (R. 70–73). The charge recited specifically that through investigation it had been learned that the petitioner had engaged in abnormal sex acts with one Lieutenant Commander Herman Andrew Dudley, U.S.N.R., in 1944; that he associated with known homosexuals; and that he had resided at an address in Washington, D.C., which was a "hangout" for homosexuals and had failed to disclose this residence upon various official forms filled out by him for the Air Force between 1948 and 1953 in connection with his employment (R. 71–72). Since petitioner was not employed by the Air Force until 1948, all the allegations of misconduct, except the withholding of information, related to a period prior to his employment.

On May 19, 1954, the petitioner filed a written reply to the charges (R. 73–78). He admitted that he knew the individuals named and had resided at the Washington address; but he denied committing abnormal sex acts with Dudley and also denied knowing that the

other individuals were homosexuals and the Washington address a homosexual "hangout" (*ibid.*). He stated that the omission to list the address was unintentional.

The portion of the charge against the petitioner concerning his conduct with Dudley referred to an affidavit made by Dudley in 1945 for another purpose (R. 71). As the affidavit was an official confidential document belonging to another government agency, and concerned many other individuals as well as the petitioner, it was not made available to the petitioner's counsel nor to the Air Force investigator (R. 9–10, 38). However, the entire portion of the affidavit which concerned the petitioner was reproduced in the statement of charges (*ibid.*).

On May 14, 1954, Air Force investigators interviewed Dudley in Paris, France, and a report of the interview was transmitted to General Landon on June 1, 1954, after the charge had been made against the petitioner, but before the final notice of removal (R. 41). The petitioner's counsel was later permitted to see the part of the investigation report concerning this interview with Dudley (R. 99).

On June 14, 1954, the petitioner received a "Notice of Removal" stating that a final decision had been made to remove him from his position, effective June 15, 1954 (R. 78–81). This notice explained that the petitioner's reply had not been sufficient to warrant withdrawal of the charges (R. 79).

The petitioner was advised that he could request review of the removal decision by the Secretary of the

Air Staff, pursuant to the Air Force grievance procedure as set out in Headquarters Office Instruction ("H.O.I.") 40–47 (R. 81).[1] The petitioner, through his attorney, invoked this procedure and requested an oral hearing, which was held on July 28, 1954, before an Ad Hoc Grievance Committee appointed by the Secretary of the Air Staff in accordance with the provisions of Sec. 7(e)(1) of the Air Force Grievance Procedure Regulations, H.O.I. 40–47 (R. 1–70).[2] The proceeding before the Ad Hoc Grievance Committee was, by its nature, an administrative, rather than a quasi-judicial hearing, and the burden was on the petitioner to furnish information concerning his grievance (H.O.I. 40–47, Sec. 7(a) (App., *infra*, p. 14) (R. 99)). The committee was merely a fact finding body, convened for the purpose of advising the Secretary of the Air Staff with regard to the petitioner's case (H.O.I. 40–47, Sec. 7(e)(2) (App., *ingra*, pp. 14–15), R. 2). At the hearing, the petitioner did not produce any witnesses, and he did not testify, although he was free to do so (R. 98–99).

The petitioner had requested that General Landon be present at the hearing (R. 87). The committee,

[1] The Headquarters Office Instruction was issued by order of the Chief of Staff as the grievance procedure applicable for civilian personnel of Headquarters USAF Office of the Secretary of the Air Force, and Air Force field activities serviced by the Headquarters Civilian Personnel Office. The provisions of the Instruction are consistent with the provisions of Air Force Manual 40 1, Section 2, Paras. 1–15, which sets out the grievance procedure generally applicable to Air Force personnel.

[2] See App., *infra*, p. 14.

which did not have the power to compel the presence of witnesses (H.O.I. 40–47, Sec. 7(g) (App., *infra*, p. 16)), had requested General Landon to appear, but he was unable to be present on the date of the hearing (R. 7). The committee denied the petitioner's request for postponement of the hearing on the ground that Colonel Breeze, General Landon's executive officer, was present and could represent General Landon fully with respect to the petitioner's case (R. 15–16).

The petitioner had also requested the presence of a representative of the District of Columbia police department who could testify that certain persons named in the "Notice of Proposed Removal" were identified by the police department as homosexuals. The committee ascertained that it was the policy of representatives of the police department not to appear at such hearings and not to make their records available (R. 13). Prior to the hearing, the members of the committee went to the office of the Chief of the Morals Division of the police department, to verify the police report underlying the "Notice of Proposed Removal" and to attempt to obtain the presence of the officer at the hearing (R. 36–37, 99).[4]

Subsequent to the petitioner's hearing before the Ad Hoc Grievance Committee, the Secretary of the Air Staff sustained his removal (R. 88). Pursuant to the grievance procedure, the petitioner's case was further reviewed by the Office of the Chief of Staff of the Air Force and his dismissal was sustained by

[4] The officer advised the committee that he would not attend the hearing, and he did not do so (R. 35).

that office. Still under the terms of the grievance procedure, the petitioner then appealed to the Secretary of the Air Force. On May 18, 1956, the Secretary, acting through the Deputy for Manpower Personnel and Organization, advised the petitioner that the decision removing him was final (R. 99).

On June 26, 1956, the petitioner filed a suit for reinstatement against Secretary of the Air Force Donald A. Quarles. That suit was dismissed because of the petitioner's failure to make a timely substitution of the party defendant. The present suit for reinstatement was thereupon instituted. The petitioner urged that the Air Force had committed numerous violations of his procedural rights in removing him (R. 91–93). The district court entered judgment for defendant, concluding that the petitioner's dismissal was (R. 99–100) "in no way arbitrary nor capricious" and that the petitioner "was afforded all of the procedural rights prescribed" in the grievance procedure. On the petitioner's appeal, the Court of Appeals for the District of Columbia Circuit entered a *per curiam* order of affirmance. The order stated that the petitioner had been accorded his statutory and procedural rights (Pet. 1a).

ARGUMENT

1. It is clearly settled that matters relating to the discharge of federal executive employees are within the discretion of the employing agencies, and that judicial review of such matters is limited to the determination of whether the dismissal was effected in compliance with the applicable procedures and stat-

utes. *Eberlein* v. *United States*, 257 U.S. 82; *Keim* v. *United States*, 177 U.S. 290; see also *Hargett* v. *Summerfield*, 243 F. 2d 29 (C.A.D.C.), certiorari denied, 353 U.S. 970; *Boylan* v. *Quarles*, 235 F. 2d 834 (C.A.D.C.). In the present case, both courts below held that, in discharging the petitioner, the Air Force complied with all of the applicable procedural requirements. Accordingly, there is no occasion for further review by this Court.

In conformity with the Lloyd-LaFollette Act, 5 U.S.C. 652(a), *supra*, pp. 2–3, and Civil Service Regulations, 5 C.F.R. 9.102(a)(1) (App., *infra*, p. 13), the petitioner received a detailed written notice of the charges preferred against him, opportunity to file a reply thereto, and a written decision stating that the charges had been sustained. These steps fully satisfied petitioner's statutory rights under the Lloyd-LaFollette Act.[6] The statute gives no right to a hearing and imposes no substantive limitations upon the discretion of the employing agency. And, contrary to the petitioner's argument, the Fifth Amendment does not grant government employees a right to a quasi-judicial hearing prior to removal.

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[6] The petitioner alleges that the dismissal was in violation of Civil Service Regulations (5 C.F.R. 9.102(a)(1) (App., *infra*, p. 13)) on the ground that it was based in part on charges not specified in the notice (Pet. 17).[5] The record (R. 56–57, 62–63) shows that the Air Force made further inquiry of the petitioner's accuser after the notice of charges was issued and considered the information so obtained in disposing of the case. However, there is no indication whatsoever that any evidence of additional acts of misconduct was received, rather than a reaffirmation of the original accusations. The final action was specifically based on the original charges (R. 79).

The original notice of proposed removal might perhaps be open to the technical objection that the specifications did not support the charge of "Immoral Conduct Off Duty" because the acts and associations specified were stated to have occurred prior to the petitioner's employment by the Air Force in 1948 (R. 70–72, 91). The petitioner, who was represented by counsel, has never raised this question, perhaps because he knew that the formal charge could have readily been amended to specify his concealment of his residence, which was alleged to be a "hangout for a homosexual clique" (R. 72). That concealment took place during his employment by the Air Force at various times from 1948 to 1953; was referred to in the charge (R. 71); and was specifically relied on in the dismissal (R. 80).

2. The bulk of the petitioner's argument deals with the procedures followed in connection with the grievance proceeding initiated by the petitioner to review his dismissal. It is important to understand that an Air Force grievance proceeding is not part of the dismissal procedure established under the Lloyd-LaFollette Act, nor is it established for the specific purpose of reviewing dismissals. It is a separate and an additional procedure adopted by the Air Force, following the labor relations practices established under collective bargaining, in order to enable the Secretary to deal with all kinds of complaints by civilian employees arising out of their employment. Thus, the petitioner had no constitutional or statutory right to a grievance hearing, and no rights under the procedure beyond those which the regulations gave him.

The petitioner does not assert that the grievance procedure was not conducted in accordance with the regulations. The burden of proof is on the grievant, as the regulations make clear, and there is no obligation on the Air Force to produce witnesses or present evidence justifying the action involved. An *ad hoc* committee is established to look into the complaint, make such investigation as is appropriate, and hear the complainant and his witnesses in the event he desires to appear. This is just what the committee here appointed did. It investigated the complaint and, after interviewing the police, made the results of such investigation available to the petitioner. It provided him with all the information he needed in order to present his case. It requested the presence of the witnesses desired by him and proceeded without the presence of the person responsible for his dismissal only when it had reason to believe that it would be possible to go ahead because another officer equally able to present the necessary information was present. This is not a situation where an accused must be faced with his accusers, because at this stage of the proceeding the petitioner was himself the accuser.

Neither *Greene* v. *McElroy*, 360 U.S. 474, nor the procedures established in connection with security cases (Pet. 10–11) have any relevance to the present litigation. The case and the regulations are both concerned with procedures to be followed in connection with the dismissal of employees on security grounds. The dismissal here was pursuant to the Lloyd-LaFollette Act

and the procedures under attack are those followed in the grievance proceeding.

3. The main complaint on the merits is that the affidavit which was the first item referred to in the specification of charges was executed nearly ten years before the charges were filed. However, there is no allegation that the facts came to the attention of the petitioner's superiors at that time, or at any specified time before action was taken. The petitioner's failure to list his residence at a "homosexual hangout" blocked investigations which might have been made sooner. There is therefore no basis for an accusation of unreasonable delay.

Whether the misconduct in the past was sufficient evidence of petitioner's undesirability as an employee at the time of his dismissal—a question which petitioner does not raise—was a substantive question of personnel policy for the executive department; it is not reviewable by the courts. *Eberlein* v. *United States*, 257 U.S. 82.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL, 1961.

APPENDIX

Section 9.102(a)(1) of Civil Service Commission Regulations, 5 C.F.R. 9.102(a)(1) (1949 ed.) provides, in pertinent part:

> No employee, veteran or nonveteran, shall be separated, suspended, or demoted except for such cause as will promote the efficiency of the service and for reasons given in writing. The agency shall notify the employee in writing of the action proposed to be taken. This notice shall set forth, specifically and in detail, the charges preferred against him. The employee shall be allowed a reasonable time for filing a written answer to such charges and furnishing affidavits in support of his answer. He shall not, however, be entitled to an examination of witnesses, nor shall any trial or hearing be required except in the discretion of the agency. If the employee answers the charges, his answer must be considered by the agency. Following consideration of the answer, the employee shall be furnished at the earliest practical date with a written decision. If the agency determines that removal or other action is warranted, the employee shall be notified in the decision of the reasons for the action taken and its effective date. Copies of the charges, notice of hearing (if any), answer, reasons for removal, or other action, shall be made a part of the records of the department or agency concerned.
>
> * * * * *

The Federal Personnel Manual, TS 350 (Aug. 1, 1951 to Sept. 17, 1959), provided in pertinent part (at S1-21):

> *Decision by appointing officer.*—The question whether or not the reasons for the separation, suspension, or demotion are sufficient is a mat-

ter for final determination by the appointing officer. However, the separation, suspension, or demotion, if made, must be upon one or more of the charges presented to the employee and which he has had an opportunity to answer, and not upon others.

Section 7(a) of Headquarters Office Instruction 40–47 provides:

> 7. *Grievance Procedure:*
>
> a. *Employee Responsibility in Presentation of Grievance.*—An employee who wishes to present a grievance must furnish detailed and specific information concerning his grievance and will present it in accordance with the procedures in b and/or c below. The presentation, whether oral or written, must specify the exact nature of the employee's grievance and cite the name(s) of the person(s) complained against and specific incidents leading to the grievance, including date, time, place, and circumstances. Supervisors will be able to resolve grievances satisfactorily only if the employee furnished specific and complete information concerning his grievance.

Section 7(e) of Headquarters Office Instruction 40–47 provides:

> e. *Grievance Committee Hearings:*
>
> (1) *Composition of the Committee.*—The grievance committee will be appointed on an *ad hoc* basis by the Secretary of the Air Staff. The committee will be composed of Air Force personnel and will consist of four persons. A representative of the Headquarters Civilian Personnel Office will serve as a nonvoting chairman. At least two of the three voting members will be civilian employees one of whom will be of the same or similar working level as the employee presenting the grievance, whenever feasible. Attendance of the full membership of the committee will be required to constitute a quorum.

(2) *Functions of the Committee.*—The committee will serve as a fact-finding and advisory body. It has one primary purpose which is to assist the Secretary of the Air Staff in arriving at a prompt and fair decision by:

(a) Making a full and complete investigation of the evidence.

(b) Impartially appraising the evidence.

(c) Reporting to the Secretary of the Air Staff a record of the hearing proceedings, a statement of the committee's findings, and its recommendations.

* * * * *

(5) *Conduct of Committee Hearings:*

* * * * *

(d) *Order of Proceedings.* The order of proceedings will be as follows:

1. Testimony and other evidence by the employee and/or his representative; questioning by the person(s) complained against and committee members.

2. Testimony and other evidence by the employee's witnesses; questioning of each witness by the person(s) complained against and committee members. Each employee witness will be released, subject to recall if necessary, following completion of his testimony and questioning.

3. Testimony and other evidence by the persons who wish to refute or comment upon the employee's grievance; questioning by the employee, his representative, and committee members.

4. Witnesses of person(s) complained against; questioning of each witness by the employee, his representative, and committee members. Each witness will be released, subject to recall if necessary, following completion of his testimony and questioning.

5. Rebuttal and summation by both sides.

Section 7(g) of Headquarters Office Instruction 40–47 provides:

> (g) *Witnesses.*—The committee has no authority to compel witnesses to give testimony. However, if necessary to insure adequate presentation of testimony for either the complainant or the person(s) complained against, the committee may request appropriate administrative authority to require the attendance of Air Force employees as witnesses. The committee may also entertain a request from the employee and other persons giving testimony to call other witnesses in addition to those originally produced. When such a request is made, the committee may require an explanation of the purpose and the basis for the request and an indication that the testimony of the witness or witnesses requested will be competent, relevant, and material to the case. The committee may, in its discretion, decide not to call any additional witness if it considers the action unnecessary to a fair consideration of the grievance or otherwise impracticable for clearly demonstrable reasons.